(3)

No. 87-2082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MACARTHUR COMPANY and WESTERN MACARTHUR COMPANY,

Petitioners,

v.

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HERBERT S. EDELMAN

LEVIN & WEINTRAUB & CRAMES
225 Broadway
New York, New York 10007
(212) 962-3300

LOWELL GORDON HARRISS*
LAUREEN F. BEDELL

DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Attorneys for Respondents

QUESTION PRESENTED

Does the Bankruptcy Court, with jurisdiction over an item of property in which the debtor has title, possession, and an unquestioned interest, have the authority to dispose of the whole of that property and to require that any claimed interest of any non-debtor in a portion of that property be asserted only against the proceeds of the disposition?

RULE 28.1 STATEMENT

Respondent Manville Corporation is a public corporation organized under Delaware law. The other respondents (or their predecessors) are (or were) direct or indirect wholly-owned subsidiaries of respondent Manville Corporation. Respondent Manville Corporation owns all of the capital stock of Manville Forest Products Corporation, a Delaware corporation, and various foreign corporations located in Europe, South America, and the Far East.

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The respondents Manville Corporation and affiliated debtors ("respondent") oppose the petition of MacArthur Company and Western MacArthur Company ("petitioner") for a writ of certiorari. As set forth below, the requirements of the issuance of a writ of certiorari are not satisfied, and no cause whatsoever exists for further review of this matter.

COUNTERSTATEMENT OF THE CASE

Respondent will not enumerate all of the factual inaccuracies or unsupported statements contained in the petition.* These matters are irrelevant for purposes of upholding the authority of a bankruptcy court over the whole property in which a debtor has title, possession and an interest. The facts necessary for assessing the petition are set forth in the opinion of the court of appeals *(see* Appendix, D-3 — D-5) and the various other opinions growing out of this reorganization case referred to therein. In addition to the facts set forth in the opinion of the court of appeals, respondent will elucidate certain facts more fully.

One of respondent's principal assets at the time of the filing of the Chapter 11 case was its insurance policies. Respondent, like most major corporations, maintained substantial amounts of comprehensive general liability insurance. These policies were issued to respondent (or its predecessors) from the late 1920's through 1978. They provided respondent with indemnity for, *inter alia*, losses incurred by the named insured

* Petitioner's statements (Pet. at 6, 7) as to the testimony at the approval hearing, the nature of their objections, and the nature of the bankruptcy court's ruling are inaccurate. Petitioner's statements concerning the number and types of suits against it (Pet. at 5) are nowhere contained in the record. Nor is there any basis in the record or in any offer by petitioner for determining whether petitioner has been held liable for its own acts of negligence or, as petitioner tries to suggest, only for passive negligence as a mere distributor of products manufactured by respondent. The court of appeals noted the uncertainty as to whether petitioner had any claim. *See* Appendix D-4.

(respondent) for product liability claims asserted against it. While the policies were issued to respondent and the named insured was respondent (or its predecessors), under the definitions in these (and most) comprehensive general liability policies many other entities were potentially "co-insureds." Other "co-insureds" under these policies included officers and directors, affiliated corporations, and, at least under some policies, vendors of products manufactured by respondent.

Although there were many potential "co-insureds" under these comprehensive general liability policies, all insurance provided by the policies was subject to the same definitions, exclusions, and limits. There were no separate "pots" of insurance for different potential "co-insureds"; there were no discrete or separate limits, for example, for vendors. Rather, the insurance provided was an undivided, inseparable whole, and the first insured to incur indemnifiable losses could exhaust all of the available insurance. For example, if a primary policy had an annual aggregate product liability limit of $500,000, and respondent incurred indemnifiable losses (*i.e.*, settled product liability claims or paid judgments) of $500,000, the insurance provided by that policy would be exhausted, and no "co-insured" would have any claim under the policy. *See* Appendix D-7. Similarly, if any "co-insured" incurred indemnifiable losses that reduced or even exhausted the policy limits before claims were asserted against respondent, respondent would have a reduced claim or even no claim under the policies. All "rights" under the policies derive from the fact that respondent acquired the policies, but no "co-insured" has any right to any coverage that was severable or separate. *Ibid.*

The importance of these insurance assets to respondent's reorganization was obvious. After the Chapter 11 filing, however, various asbestos health claimants attempted to bring direct action suits against respondent's insurers, claiming a right to the insurance proceeds deriving from respondent's right under the policies to an indemnity for product liability losses. Although there had been a prior order of the bankruptcy court enjoining such attempts by third parties to assert rights to respondent's insurance policies outside the Chapter 11 case,* a decision by the United States Court of Appeals for the Fifth Circuit seemed to endorse such direct actions where permitted by state procedural law.** A district court, however, held that these very insurance policies were property of respondent's estate regardless of who might ultimately be entitled to proceeds, and enjoined, *inter alia*, attempts by any person to proceed directly against respondent's insurers. The Court of Appeals for the Fifth Circuit then altered its view, agreeing that these policies were property of respondent's estate and refusing to permit such direct action suits against the insurers based on these policies.*** Notwithstanding these rulings, however, the insurers insisted that any settlement terminate all obligations under these policies.

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* *See GAF Corp.* v. *Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984).

** *See Wedgeworth* v. *Fibreboard Corp.*, 706 F.2d 541 (5th Cir. 1983).

*** *See In re Davis*, 730 F.2d 176 (5th Cir. 1984).

The provisions of the settlement agreements to which petitioner objects are termed the "channeling" and "injunctive" provisions. The petition does not quote or discuss the actual language of such provisions or the actual order entered by the bankruptcy court. The provisions and impact of these orders are as follows. The $770 million that respondent received from the insurers - the *res* - is subject to the jurisdiction of the bankruptcy court. *E.g.*, Appendix A-4 (Clause 1.2(A)). Under the order of the bankruptcy court, every person is enjoined from suing the settling insurers, but only on any claim based upon, arising out of, or related to *these* policies which have been settled. *E.g.*, Appendix A-5 (Clause 1.2(D)). Thus, any direct action claimant or asserted "co-insured" under these policies is enjoined from proceeding against the settling insurers for any claim under these policies. However, any asserted rights to or under the settled policies are channeled away from the policies themselves and to the proceeds of the settlement, which are under the control of the bankruptcy court. *E.g.*, Appendix A-4 (Clause 1.2(B)). Any person like petitioner who claims rights under these settled insurance policies may come into the bankruptcy court, establish as a matter of fact and as a matter of law its right, and be paid out of the *res*. Only then are the *net* proceeds of the settlements allocated under the plan of reorganization. The interrelated purpose and effect of the channeling and injunctive provisions of the order are to preclude suits against the settling insurers, which have, in effect, bought back their insurance policies, and to channel any claim based on those policies to the proceeds of the settlement.

The petition refers intermittently, and without citation, to respondent's plan of reorganization. The plan of reorganization was confirmed after the insurance settlements had been

approved. The order of confirmation was affirmed by the district court and by the court of appeals. The order of confirmation, independent of the orders approving the insurance settlement agreements, contains, *inter alia*, injunctions against suits against the settling insurers based on, arising under, and related to the settled insurance policies. Petitioner did not object to the plan or the order of confirmation and did not appeal therefrom.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision of the Second Circuit does not conflict with any decision of this Court or any court of appeals. To the contrary, as shown below that decision faithfully follows and applies the decisions of this and other courts. All courts that have been faced with these issues agree on both the rationale and the result. Petitioner does not even contend that there is a conflict among the circuits, much less a conflict concerning a substantial, recurring issue of national significance. Rather, petitioner argues factual matters and tries to invoke principles that are simply not involved in this case. Moreover, the decision below was a correct application of federal bankruptcy law governing the authority of a bankruptcy court over property in a proceeding under Title 11. Petitioner cannot and does not refute the analysis or application of these established principles of federal law.

Petitioner does not even attempt to argue that the decision of the Second Circuit conflicts with any decision of this Court or any court of appeals. While the petition is couched in

terms that the bankruptcy court supposedly exceeded its "jurisdiction," petitioner does not state what it means by "jurisdiction." There is, however, no conflict that a bankruptcy court does have, by specific legislation, exclusive jurisdiction over property of the debtor.* As this Court wrote, that jurisdiction under Section 541(a) extends to the whole property if the debtor has an interest in that property.** There is no conflict that the "property" over which a bankruptcy court has jurisdiction was broadly defined by Congress.*** There

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* Both Section 541 of Title 11, and Section 1334(d) of Title 28, specifically give the bankruptcy court *exclusive jurisdiction* over property of the debtor wherever located. This grant of jurisdiction reflects the purpose of bankruptcy law long articulated by this Court. The fundamental basis for action by a court of bankruptcy, first articulated by this Court almost 140 years ago, is jurisdiction over the property of the debtor. *Shawhan* v. *Wherritt*, 48 U.S. (7 How.) 627, 643 (1849). The purpose of bankruptcy law is to place property of the debtor under control of a court, *e.g.*, *Straton* v. *New*, 283 U.S. 318, 320-21 (1931), and to convert that property to cash for distribution to creditors. *E.g.*, *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554 (1915).

** In *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983), the Court held that the estate included property seized by a secured party prior to the filing, because ownership (title) still resided in the debtor, even if the market value of the property may have been less than the lien. This Court rejected the notion that Section 541(a) limited jurisdiction only to the debtor's interest, rather than the entire property in which the debtor had an interest.

> "Section 541(a)(1) speaks in terms of the debtor's 'interests . . .in property,' rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section." *Id.* at 204 n.8.

This concept is routinely applied. *See*, *e.g.*, U.S.C. § 363 (h), (i), (j).

*** The breadth of the definition of "property" contained in Section 541(a) of the Bankruptcy Code was emphasized by this Court in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204-05 & nn.8-10 (1983).

is no conflict that insurance policies in general, and liability insurance policies in particular, are "property" of the debtor,* and indeed both the Second Circuit and the Fifth Circuit have ruled that these very policies are property of respondent's estate.** There is no conflict that a bankruptcy court may dispose of property in which the debtor has an interest and transfer any asserted interest of a non-debtor from the property to the cash proceeds of the disposition.*** Finally, there is no conflict that a bankruptcy court has authority to enforce such an order by injunctive means.****

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* This Court in *Burlingham* v. *Crouse*, 228 U.S. 459, 471 (1913), and numerous other courts, *e.g.*, *In re Pearl-Wick Corp.*, 15 B.R. 143, 148 (Bankr. S.D.N.Y. 1981), *aff'd*, 26 B.R. 604 (S.D.N.Y. 1982), *aff'd*, 697 F.2d 295 (2d Cir. 1982), have held insurance policies issued to the debtor to be property of the estate. All courts of appeals agree that product liability policies issued to a debtor are property of the estate. *See A.H. Robins Co.* v. *Piccinin*, 788 F.2d 994, 1001 (4th Cir.), *cert. denied*, 107 S. Ct. 251 (1986); *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984).

** *See* Appendix D-6 and *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984).

*** This principle was articulated by this Court over 100 years ago in *Ray* v. *Norseworthy*, 90 U.S. (23 Wall.) 128, 134-35 (1875). This authority is "granted by implication" in every bankruptcy codification, *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 227 (1931), and is routinely applied by courts of appeals, *see, e.g.*, *Farmers Bank* v. *Julian*, 383 F.2d 314, 322 (8th Cir.), *cert. denied*, 389 U.S. 1021 (1967); *Rubenstein* v. *Nourse*, 70 F.2d 482, 484 (8th Cir. 1934); *Fierman* v. *Seward Nat'l Bank*, 37 F.2d 11, 13 (2d Cir. 1930).

**** *E.g.*, *In re Abraham*, 421 F.2d 226, 227-28 (5th Cir. 1970); *In re Wiltse Bros.*, 361 F.2d 295, 299 (6th Cir. 1966); *Gotkin* v. *Korn*, 182 F.2d 380, 382 (D.C. Cir. 1950); *Chauncey* v. *Dyke Bros.*, 119 F. 1, 3 (8th Cir. 1902).

The uniform agreement among courts of appeals on the principles articulated and applied by the Second Circuit shows that petitioner has not established the basic prerequisite for further review by this Court. Petitioner attempts to avoid the reach of Section 541 and the established case law that liability insurance policies are "property" of the estate by asserting that its "interests" in the insurance policies are somehow separate from and unrelated to the respondent's interest. This factual contention, however, was rejected by the courts below as unsupported by the record, and presents no issue worthy of review. Moreover, even if petitioner's asserted interest in respondent's policies were "separable," because the bankruptcy court has jurisdiction over the whole property (the policies) by virtue of the undisputed fact that the debtor has title, possession and interests in the policies, that court necessarily has jurisdiction over any asserted, third-party interests in the property.* The failure of the petition to address either the explicit criteria required by Rule 17 or the actual reasoning of, and the numerous, uniform authorities relied upon by, the court of appeals is a tacit but telling concession that review by certiorari is utterly inappropriate.

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* Were this not the case, any third party could frustrate a reorganization simply by asserting that it had a claim against property, which under petitioner's view would divest the bankruptcy court of jurisdiction over a portion of the property. It is precisely because of petitioner's ability to significantly affect the debtor's estate via such direct claims that the courts below rejected as unsupported by the record petitioner's contention that its "interests were 'too remote' from the debtors' to come within the jurisdiction of the bankruptcy court." *See* Appendix D-6 — D-7.

Petitioner's attempt to invoke principles not involved in this case further demonstrates the impropriety of review. The argument that a guarantor's obligation to a creditor cannot be "discharged" by a plan of reorganization (Pet. at 11-13) is irrelevant. As the court of appeals wrote, the order is not a "discharge in bankruptcy." *See* Appendix D-5. Rather, any rights petitioner might have in the policies, which rights are totally derivative of respondent's rights as the named insured, are merely channeled from the policies to the $770 million *res*. Petitioner's further extended argument that review should be granted because of the supposedly "erroneous" factual determinations and "erroneous" factual applications below (Pet. at 17-20) ignores the repeated admonition that this Court does not sit to review such matters. Finally, even the issue as petitioner defines it presents no immediate issue of national significance even arguably necessitating review. Petitioner speculates that it is "likely" that this decision may become a "blueprint" and that the "danger" is that it may "be repeated in numerous . . . cases to follow." (Pet. at 10, 24-25). Such rank conjecture that the "question" might recur shows that review is inappropriate.

The decision of the court of appeals applied long-established, codified principles of bankruptcy law. These principles - the essential authority of a bankruptcy court over property and the operation of that authority - are, as the Second Circuit wrote, "fundamental" to our bankruptcy system. The petition should be denied because review is unnecessary and inappropriate where, as here, the reasoning and the result are correct. In addition to the reasons set forth by the court of appeals, the following support the determination.

State law has not, as petitioner now contends, been "displaced." Federal law determines the scope of the authority of

a federal bankruptcy court to dispose of property in which the debtor has some interest in a federal reorganization proceeding.* Federal law determines whether a bankruptcy court has authority to dispose of property of a debtor free of the claimed interest of a non-debtor, with the latter's asserted interest being channeled from the property to the proceeds. However, whether the non-debtor in fact and in law has an interest in the proceeds, and the amount thereof, is determined by state law. This issue was not addressed by the court of appeals because it was unnecessary to do so. Petitioner has never attempted to assert its claimed rights against the $770 million *res*, as the orders of the bankruptcy court specifically permit. When and if petitioner makes such a claim, a hearing would be held and appropriate state law would be applied.** Petitioner's "state law" contention (Pet. at 22-23) is, like its "discharge" assertion, a non-issue.

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* *See, e.g.*, 28 U.S.C. § 1334(d); 11 U.S.C. §§ 541, 363 (h), (i), (j).

** To establish that it had "rights" under any primary policy and therefore to a portion of the $770 million *res*, petitioner would have to show at least (1) that there was a vendor endorsement, (2) that the claim against petitioner fell within both the endorsement and the underlying insuring agreement, (3) that no exclusions applied, (4) that the underlying claim triggered the policy, and (5) that the aggregate policy limits had not been exhausted. Moreover, petitioner, which has its own insurance, would be confronted with the "other insurance" provision in respondent's policies, even if it were a proper party to assert the rights (because if MacArthur's own insurers have paid, as seems to be the case, they are subrogated to MacArthur's "rights"). With respect to excess policies (and practically all the policies settled are excess policies), petitioner would have to show the foregoing where the excess policies "followed form"; where they did not, petitioner would have to show some other basis for coverage in the policy language. It is little wonder that the bankruptcy court termed petitioner's assertion of "rights" under the policies "highly speculative." *See* Appendix D-4.

A fundamental policy of the bankruptcy laws is to maximize values for creditors. That policy is advanced by permitting the sale of property in which the debtor has *an* interest, with any asserted interest of a non-debtor claimant channeled to and satisfied from the proceeds. All parties are protected: the transferee will pay the most for unquestioned "ownership" of the property; the non-debtor claimant has any valid claim paid first from the proceeds; the estate and its creditors receive the maximum net. Petitioner would reverse this goal and prevent bankruptcy courts from maximizing values and reducing uncertainty for all concerned.

CONCLUSION

The petition does not meet the criteria set forth in Rule 17 or prior decisions of this Court for the issuance of the writ. There is no institutional reason or justification for further review by this Court. The petition should be denied.

Dated: New York, New York
July 20, 1988

/s/ LOWELL GORDON HARRISS
LOWELL GORDON HARRISS*
LAUREEN F. BEDELL

DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

HERBERT S. EDELMAN

LEVIN & WEINTRAUB & CRAMES
225 Broadway
New York, New York 10007
(212) 962-3300

Attorneys for Respondents

* Counsel of Record